

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

JOHN E GREEN
Claimant

APPEAL NO. 17A-UI-07465-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SIMPLY ESSENTIALS LLC
Employer

OC: 06/11/17
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 12, 2017, reference 02, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that the claimant was discharged on June 9, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on August 10, 2017. Claimant John Green did not register a telephone number for the hearing and did not participate. Clint Richmond, Human Resources Manager, represented the employer. The administrative law judge took official notice of the agency's administrative record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of documenting the employer's participation in the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: John Green was employed by Simply Essentials, L.L.C. as a full-time production laborer from February 2017 until June 13, 2017, when Joyce Davis, Department Manager, discharged him for attendance. Ms. Davis was Mr. Green's immediate supervisor. Mr. Green's usual work hours were 7:40 a.m. to 4:40 p.m., Monday through Friday.

The employer has a "no fault" attendance policy that the employer reviewed with Mr. Green at the start of his employment. If Mr. Green needed to be absent from work, the policy required that Mr. Green telephone the designated absence reporting number at least one hour prior to the scheduled start of his shift and leave his name, his supervisor's name, the reason for the absence, and a phone number where he could be contacted. If Mr. Green needed to be absent

multiple days, the policy required that Mr. Green call the employer each day of the absence. The employer has a site administrator who reviews the calls, documents the calls, and tracks attendance points. The site administrator's documentation concerning the notice Mr. Green provided of his need to be absent may or may not be accurate or complete. In addition, if Mr. Green spoke to Ms. Davis regarding an absence, Ms. Davis would not necessarily document that discussion.

On June 13, 2017, Mr. Green returned to work after a several-day, illness-based absence. The employer witness does not know what discussion took place between Mr. Green and Ms. Davis upon Mr. Green's return to work on June 13, 2017. Prior to that day, Mr. Green had last performed work for the employer on June 5, 2017. Mr. Green had left work early. The employer witness does not have additional information concerning that absence. Mr. Green was absent on June 6, 7, 8, 9, 10, and 12, 2017. Each absence was due to illness and each was properly reported to the employer. Mr. Green provided the employer with medical notes that covered the absences on June 7, 8, 9 and 12. The employer points to the absence on June 6 as the absence that triggered the discharge under the no-fault attendance policy.

Prior to the early departure on June 5, 2017, Mr. Green had most recently been absent on April 10, 2017. That absence was properly reported, but the employer witness lacks additional information concerning the absence. Mr. Green had four earlier absences that factored in the discharge. On or about April 10, 2017, Ms. Davis had issued a reprimand to Mr. Green for attendance.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The disqualification shall continue until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory

conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish a current act of misconduct based on attendance or otherwise. The employer witness lacked personal knowledge concerning any of the absences that factored in the discharge decision. The weight of the evidence establishes an illness-based absence that commenced with the early departure on June 5 and that concluded with the absence on June 15, 2017. The weight of the evidence establishes that Mr. Green provided proper notice

regarding each absence. Mr. Green's failure to provide a medical note that covered June 5, June 6 and/or June 10, 2017 does not alter the fact that the absences were due to illness, properly reported and excused absences under the applicable law. None of the absence period that commenced on June 5, 2017 may be used as a basis for disqualifying Mr. Green for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Green was discharged on June 13, 2017 for no disqualifying reason. Accordingly, Mr. Green is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The July 12, 2017, reference 02, decision is affirmed. The discharge date is corrected to June 13, 2017. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs